

**United States Department of Labor
Employees' Compensation Appeals Board**

B.H., Appellant)

and)

U.S. POSTAL SERVICE, SAN ANTONIO POST)
OFFICE, San Antonio, TX Employer)
-----)

**Docket No. 23-0497
Issued: December 29, 2023**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 22, 2023 appellant filed a timely appeal from an October 17, 2022 merit decision and a February 1, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence or disability on or after June 21, 2021, causally related to his accepted February 26, 2021

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 1, 2023 nonmerit decision, OWCP received additional evidence. The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

employment injury; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On March 2, 2021 appellant, then a 34-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 26, 2021 he injured his left arm when he fell from a pallet jack while in the performance of duty. He returned to modified duty effective February 27, 2021, and full-duty work, effective March 5, 2021.

On July 13, 2022 appellant filed a notice of recurrence (Form CA-2a) for medical treatment and time lost from work commencing June 21, 2021 due to the February 26, 2021 employment injury. He noted on the claim form that he was experiencing pain in his upper and lower back from moving, twisting, bending over, standing for long periods, pushing, pulling, and lifting heavy objects. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on July 13, 2022.

In a development letter dated July 22, 2022, OWCP informed appellant of the deficiencies of his recurrence claim. It advised him of the type of additional medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

On August 2, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work for the period July 20 through August 8, 2022 as a result of his accepted employment injury. By letter dated August 9, 2022, OWCP advised him that no action would be taken on his claim for compensation until the recurrence claim was adjudicated.

In a report dated August 15, 2022, Donald T. Stevenson, a physician assistant, noted that appellant related complaints of left shoulder and thoracic pain for the past year. He diagnosed cervicalgia, myalgia, and pain in the shoulder, thoracic spine, and low back and recommended a functional capacity evaluation (FCE).

In an August 25, 2022 response to OWCP's questionnaire, appellant indicated that after his February 26, 2021 employment injury, his back pain worsened while performing his job duties, including lifting heavy sacks, standing for hours at a time, bending over, and pushing objects. He denied any subsequent injuries and denied participating in any activities outside of work that could have affected his accepted injuries.

In a letter dated September 7, 2022, Mary Patterson, a nurse practitioner, indicated that appellant was unable to lift more than 15 to 20 pounds and would require 10-minute breaks every two hours from prolonged sitting and standing. She further noted that he related a history of a back injury in March 2021 with ongoing upper and lower back stiffness and pain.

In a note dated September 9, 2022, Dr. Sudhir R. Gogu, an osteopath Board-certified in family practice, diagnosed cervicalgia, myalgia, and pain in the thoracic and lumbar spine due to a fall from work machinery. He advised that appellant remain out of work until he could be evaluated by an orthopedic surgeon.

By decision dated October 17, 2022, OWCP denied appellant's recurrence claim, including his claim for disability from work for the period July 20, 2022 through August 8, 2022. It found that the medical evidence of record was insufficient to establish that he was disabled from work during the claimed period due to a worsening of his February 26, 2021 employment injury. OWCP mailed the decision to appellant's last known address of record.

OWCP continued to receive evidence, including an October 31, 2022 medical report by Dr. Jonathan S. Duncan, a Board-certified orthopedic surgeon, who diagnosed low back pain and lumbar strain and recommended an functional capacity evaluation (FCE); a November 10, 2022 report of a magnetic resonance imaging (MRI) scan of the lumbar spine dated November 9, 2022, which demonstrated degenerative changes; a November 17, 2022 FCE by Darrell Gerik, a physical therapist; a December 15, 2022 work status note by Deidra McCutchen, a physician assistant; and a January 20, 2023 medical report by Dr. Ephraim K. Brenman, a Board-certified psychiatrist, who recommended diagnostic medial branch blocks, which appellant declined.

In a December 1, 2022 memorandum of telephone call (Form CA-110), appellant advised OWCP that he had moved and provided an updated home address. In a letter of even date, OWCP forwarded a copy of the October 17, 2022 decision to the address that he had provided.

In an appeal request form dated January 2, 2023 and postmarked January 4, 2023, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 1, 2023, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence supporting his claim for disability.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁵ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁶

³ *Supra* note 1.

⁴ *See D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *G.S.*, Docket No. 23-0056 (issued July 3, 2023); *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *William A. Archer*, 55 ECAB 674 (2004); *see also Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

⁶ *See G.S., id.*; *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁸ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁹

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.¹⁰

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or an occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.¹¹

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, based on a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹² Where no such rationale is present, the medical evidence is of diminished probative value.¹³

⁷ 20 C.F.R. § 10.5(f); *J.R.*, Docket No. 23-0215 (issued July 28, 2023); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

⁸ *See S.H.*, Docket No. 23-0024 (issued July 19, 2023); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁹ *See S.W.*, Docket No. 21-1227 (issued July 13, 2023); *M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁰ 20 C.F.R. § 10.5(x); *see W.H.*, Docket No. 21-0139 (issued October 26, 2021); *A.E.*, Docket No. 20-0259 (issued April 28, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *P.R.*, Docket No. 22-1392 (issued June 12, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹² *M.S.*, Docket No. 22-1386 (issued May 18, 2023); *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

¹³ *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence or disability on or after June 21, 2021 causally related to his accepted February 26, 2021 employment injury.

On July 13, 2022 appellant filed a Form CA-2a due to worsening upper and lower back pain, beginning June 21, 2021. On the reverse side of the claim form, the employing establishment noted that he first stopped work after the claimed recurrence on July 13, 2022.

In support of his claim, appellant submitted a note dated September 9, 2022 by Dr. Gogu, who diagnosed cervicalgia, myalgia, and pain in the thoracic and lumbar spine due to a fall off of work machinery and advised that he not return to work until he could be evaluated by an orthopedic surgeon. The Board has held that pain is a symptom and not a compensable medical diagnosis.¹⁴ Moreover, Dr. Gogu did not explain with rationale whether the disability was causally related to the accepted employment injury. The Board has held that reports which lack rationale are of limited probative value on the issue of causal relationship.¹⁵ Therefore, Dr. Gogu's September 8, 2022 note is insufficient to establish appellant's recurrence of disability claim.

OWCP also received an August 15, 2022 note from a physician assistant and a September 7, 2022 note from a nurse practitioner. Physician assistants and nurse practitioners, however, are not considered physicians as defined under FECA, and their medical findings and opinions are insufficient to establish entitlement to compensation benefits.¹⁶

As the medical evidence of record is insufficient to establish a recurrence of disability on or after June 21, 2021 causally related to the February 26, 2021 employment injury, the Board finds that appellant has not met his burden of proof to establish his recurrence claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁴ See *S.L.*, Docket No. 19-1536 (issued June 26, 2020); *D.Y.*, Docket No. 20-0112 (issued June 25, 2020).

¹⁵ See *S.C.*, Docket No. 21-0580 (issued February 24, 2023); *K.T.*, Docket No. 17-1717 (issued March 27, 2018)

¹⁶ Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *N.C.*, Docket No. 21-0934 (issued February 7, 2022) (as nurse practitioners and physical therapists are not considered physicians as defined under FECA, their medical findings and opinions are insufficient to establish entitlement to compensation benefits); *M.J.*, Docket No. 19-1287 (issued January 13, 2020) (physician assistants are not considered physicians as defined under FECA); *P.H.*, Docket No. 19-0119 (issued July 5, 2019) (physician assistants are not physicians under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that “a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary.”¹⁷ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁸ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking and before the claimant has requested reconsideration.¹⁹ Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s request for an oral hearing before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124.

OWCP’s regulations provide that the request for a hearing or review of the written record must be made within 30 days of the date of the decision for which a review is sought. The Board has held that absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is called the mailbox rule.²¹ The evidence of record establishes that the October 17, 2022 decision was properly mailed to appellant at his last known address of record and was not returned to OWCP as undeliverable. Because his request for a review of the written record was submitted on January 4, 2023, it postdated OWCP’s October 17, 2022 decision by more than 30 days and, accordingly, was untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.²²

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.²³ The Board finds that, in the February 1, 2023 decision, OWCP properly

¹⁷ *Supra* note 1 at § 8124(b)(1).

¹⁸ 20 C.F.R. §§ 10.616, 10.617.

¹⁹ *Id.* at § 10.616(a).

²⁰ *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

²¹ *See J.W.*, Docket No. 21-0869 (issued January 14, 2022); *V.C.*, Docket No. 20-0798 (issued November 16, 2020).

²² *See K.B.*, Docket No. 21-1038 (issued February 28, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

²³ *Id.*

exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration, along with the submission of additional evidence.

The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.²⁴ The Board finds that the evidence of record does not indicate that OWCP abused its discretion in connection with its denial of appellant's request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence or disability on or after June 21 2021 causally related to his accepted February 26, 2021 employment injury. The Board further finds that OWCP properly denied appellant's request for an oral hearing by an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

²⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2022 and February 1, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 29, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board